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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

THE BOEING COMPANY,

Plaintiff,

v.

MAZIAR MOVASSAGHI, in his official capacity as the Acting Director of the California Department of Toxic Substances Control,

Defendant.

Case No. 09-cv-03165-GEB-KJN

AMICUS CURIAE BRIEF OF SOUTHERN CALIFORNIA FEDERATION OF SCIENTISTS, *ET AL* IN SUPPORT OF DEFENDANT'S OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 22, 2010
at 9:00 a.m. before the Honorable
Garland E. Burrell. Jr.

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INTRODUCTION

The Santa Susana Field Laboratory ("SSFL") is a heavily contaminated nuclear and rocket testing facility located on the boundary of Ventura and Los Angeles Counties in Southern California. Numerous spills, releases, and accidents have occurred at the site, including a famous partial nuclear meltdown, and half a million people live within ten miles of it. Amici Curiae Southern California Federation of Scientists *et al*. have been heavily involved in the efforts to ensure cleanup of the radioactive materials and chemicals that contaminate the SSFL.

To set standards for the cleanup, the California Legislature passed and Governor Schwarzenegger signed Senate Bill 990 ("SB 990"), codified at California Health and Safety Code § 25359.20. Plaintiff The Boeing Company ("Boeing") now asks this Court to relieve Boeing from complying with the cleanup standards set forth in that legislation.

This amicus brief addresses four fundamental aspects of Boeing's allegations:

(1) First, Boeing asserts that the federal government has exclusive authority over Boeing's cleanup. However, rather than preempting state authority, the federal government long ago delegated regulatory power to the State of California. Pursuant to the Atomic Energy Act, 42 U.S.C. §2021(b), the Atomic Energy Commission ("AEC") in 1962 entered into an agreement with California authorizing the state to regulate numerous radioactive materials. 27 Fed. Reg. 3864 (April 21, 1962). That delegation remains fully effective today.

Until this lawsuit, Boeing has routinely recognized the state's authority over the site. From the 1960s on, Boeing and its predecessors (hereinafter referred to jointly as "Boeing") conducted operations at SSFL pursuant to state-issued licenses covering a vast array of radioactive materials. Later, after ceasing active operations at the site, Boeing recognized the state's continuing delegated authority by applying to the California Department of Health Services ("DHS") for approval of cleanup decisions. Indeed, Boeing's own documents *expressly concede* the need for such state approval.

This long history of state regulation refutes Boeing's newly minted claim of federal preemption over the SSFL activities. It also demonstrates that the outcome in the present case turns not on preemption but on California's right to exercise its delegated authority.

(2) While Boeing repeatedly refers to the activities of the Department of Energy ("DOE") at SSFL, DOE owns no land there. Instead, DOE only leased and constructed buildings on about 90 acres within the part of the site devoted to nuclear activities, a part which totals 290 acres. The 90-acre area is a fraction of the entire 2,850 acres comprising the SSFL. Since the 1960's, state licenses have regulated the radioactive work carried out in Boeing-owned buildings outside the 90 acres. Moreover, Boeing's own documents have recognized that Boeing requires state approval for cleanup of radioactive contamination associated with Boeing-owned buildings. Boeing controls the vast majority of the SSFL, and the cleanup of that land is at issue here.

In other words, Boeing turns the actual ownership and control of the SSFL on its head. It seeks to focus on the 3% of the SSFL controlled by DOE instead of the bulk of the SSFL for which *Boeing* is responsible.

Nor could Boeing prevail on the cleanup of the small part of the SSFL that DOE actually used. While Boeing claims preemption on behalf of DOE, that agency is currently deciding on the standards it will use for its part of the cleanup at SSFL. Pursuant to Judge Samuel Conti's decision in *Natural Resources Defense Council, Inc. v. Department of Energy*, 2007 WL 1302498 (N.D. Cal. 2007) ("*NRDC v. DOE*"), DOE is preparing an environmental impact statement on its decision regarding the cleanup of its portion of the SSFL site. In doing so, DOE is actively considering whether it will apply the standards set forth in SB 990. In other words, DOE is currently considering the same requirements that Boeing seeks to block on its behalf.

Boeing cannot anticipate or usurp DOE's decision-making. Until DOE chooses the cleanup levels--a decision over which Judge Conti has retained jurisdiction and which is several years away--any adjudication addressing the appropriate cleanup standards for DOE contamination at SSFL is not ripe. And because Boeing can assert only its own rights, not those of DOE, Boeing lacks standing to raise this claim.

(3) Third, the source of Boeing's claimed preemption, the Atomic Energy Act, only regulates radioactive materials. However, Boeing is responsible for both radioactive *and* chemical contamination at the SSFL, and SB 990 covers both types of contamination. In fact, nuclear work occurred on only a

fraction of the SSFL site; rocket testing and other activities involving releases of hazardous non-radioactive chemicals occurred on most of the SSFL land.

The federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901 *et seq.,* not the Atomic Energy Act, governs the cleanup of these chemicals. And as Boeing now concedes, the United States long ago delegated authority over chemical contaminants under RCRA to the State of California. Pursuant to that delegation, the state unquestionably can regulate the cleanup of hazardous chemicals at SSFL under SB 990.

(4) Finally, Boeing characterizes SB 990 as a "drastic departure from generally applicable state and federal environmental laws." Memorandum of Plaintiff The Boeing Company in Support of Motion for Summary Judgment ("Boeing Memorandum"), p. 16. But that assertion is wrong. SB 990 incorporates standard requirements used by the state in its hazardous waste cleanup law, Cal. Health & Safe. Code §25300 *et seq.,* and by the federal Environmental Protection Agency ("EPA") under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*

In short, Boeing constructs its motion on a substantially incomplete factual and legal picture of the SSFL site. The missing details compel denial of Boeing's motion.

STATEMENT OF FACTS

Amici incorporate the Statement of Facts in the brief of the state Defendant. Below, we merely highlight certain essential facts concerning the location of activities on the SSFL site.

I. THE LOCATION OF THE SANTA SUSANA FIELD LABORATORY.

SSFL sits atop a range of hills between the San Fernando and Simi Valleys, on the boundary between Los Angeles and Ventura Counties. The site is located about 30 miles northwest of downtown Los Angeles. *NRDC v. DOE*, 2007 WL 1302498, at *5; Defendant's Appendix ("Def.App.") Tab 12 p. 6. As Section 2(a) of SB 990 describes:

> The location of SSFL was chosen for its remoteness in order to conduct work that was considered too dangerous to be performed in more densely populated areas. In subsequent years, however, southern California's population has mushroomed. Today, more than 150,000 people live within five miles of the facility, and at least half a million people live within 10 miles.

Amici have attached a map that locates the site in relation to neighboring communities. *See* Amicus Appendix Tab 1 (Figure 1-1, p. 1-1, Environmental Assessment For Cleanup and Closure of the Energy Technology Engineering Center (Mar. 2003) ("EA"), Def.App. Tab 5).

II. OWNERSHIP AND ACTIVITIES IN THE SITE'S FOUR OPERATIONAL AREAS.

Critical to Boeing's motion is the breakdown of ownership and activities on the site. The SSFL consists of approximately 2,850 acres. Boeing owns *all of the SSFL site* except for 451.2 acres owned by the National Aeronautics and Space Administration ("NASA") and used for rocket testing. *See* map and acreage totals at Amicus Appendix Tab 1 (EA Figure 4-1, p. 4-2).[1]

The site contains four operational areas, Areas I through IV, plus two buffer zones of undeveloped land. *Id*. Work involving radioactive materials was authorized only in one of those areas, Area IV, which is approximately 290 acres in size. Amicus Appendix Tab 1 (EA, p. 1-1.)

Within Area IV, DOE leased 90 acres of Boeing-owned land to conduct DOE operations. DOE was "responsible for the operation of the Energy Technology Engineering Center ("ETEC") a government-owned complex of buildings located within Area IV." *Id.* The Environmental Analysis prepared by DOE identifies the location of ETEC in Figure 1-1 with a small circle in Area IV.[2] *Id.* The 90 acres leased by DOE is less than a third of the 290 acres of Area IV and about 3% of SSFL as a whole.

A map of Area IV is attached hereto as Amicus Appendix Tab 2 (Rockwell International, "CERCLA Program Phase I Installation Assessment for DOE Facilities at SSFL," Figure 3, p. 9 from Def.App. Tab 12).[3] A "dashed" line on this map divides the DOE-leased/optioned area from the remainder of Area IV. Located in that remaining part of Area IV are nuclear buildings owned by Boeing's predecessor, the Atomics International (AI) division of Rockwell. The map lists the buildings or structures in Area IV owned by the federal government or Boeing, and the government only owned

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[1] For the Court's convenience, Amici have attached key documents in an Appendix to this brief.

[2] DOE's decision to prepare this Environmental Analysis was challenged in *NRDC v. DOE, supra,* and the Court ordered DOE to prepare a full environmental impact statement. DOE's factual statements in the Environmental Analysis describing the site and its operations, however, were not challenged in that case and remain uncontested.

[3] The state Defendant previously submitted this map, but it was reduced in size. Amici have reproduced the complete map in its original size so that the Court may more easily read the key wording on it.

about half of them. Defendant's Opposition to The Boeing Company's Motion for Summary Judgment ("Def.Opp."), p. 10 n.7.

Thus Boeing--not DOE--controlled two-thirds of Area IV and half the structures in it. And Area IV, the nuclear area of the SSFL site, constitutes only 10% of the entire SSFL, the great majority of which is also controlled by Boeing. As Amici now demonstrate, Boeing is responsible for cleanup on the land it controls and has long been subject to state regulation.

ARGUMENT

I. AS BOEING HAS RECOGNIZED, THE FEDERAL GOVERNMENT DELEGATED AUTHORITY OVER RADIOACTIVE MATERIALS AT THE SSFL TO THE STATE, WHICH HAS LICENSED ACTIVITIES THERE AND APPROVED DECONTAMINATION PLANS.

A. The State Has Regulated Radioactive Materials at the SSFL Site Since the Atomic Energy Commission Delegated That Authority to the State in 1962.

The central allegation in Boeing's complaint is as follows:

> [T]hrough the AEA [Atomic Energy Act], 42 U.S.C. §§2011, *et seq.*, with exceptions not applicable here, Congress has committed the safety regulation of source, special nuclear, and byproduct materials ("AEA materials") to *the exclusive jurisdiction of the federal government*.

Amended Complaint ¶6 p. 3, emphasis added. But the AEA does not mandate exclusive federal jurisdiction over all radioactive materials. Instead, it authorizes the federal government to enter into agreements with states for discontinuance of federal authority over source, byproduct, and certain quantities of special nuclear materials. In these agreements, the federal government delegates regulation over these sources, quantities, and materials to the states. 42 U.S.C. §2021(b). The only exception is material that can form a "critical mass" (i.e., that can cause a self-sustaining nuclear reaction, such as in a weapon), which remains under federal control.

Boeing's Complaint fails to disclose that the Atomic Energy Commission *did* enter into an agreement with California in 1962. 27 Fed. Reg. 3864 (April 21, 1962), attached as Amicus Appendix Tab 3. That agreement remains in effect to this day. Pursuant to that agreement, the State has regulated the use of radioactive materials at the SSFL site for almost half a century.

Numerous Boeing documents fully recognize this State authority. For example, in 1986 Boeing's predecessor Rockwell prepared a document entitled "Nuclear Operations at Rockwell's Santa

Susana Field Laboratory--A Factual Perspective." In it, Rockwell summarizes how the state regulation at the SSFL operates in tandem with the federal Atomic Energy Commission:

> The Atomic Energy Act gave the federal government exclusive authority to regulate nuclear operations, but in 1961 the AEC agreed to delegate the authority and responsibility for licensing and regulating radioactive materials (excluding Special Nuclear Materials) to the states, provided that a state enacts enabling legislation and develops regulations compatible with the AEC regulations. *California became an "Agreement State" in 1962. Since then, the California Department of Health Services has had the responsibility for regulating the use and disposal of byproduct material* (low-level waste and radioisotopes) from the SSFL. . . .

Def.App. Tab 11 p. 39.

Rockwell accompanied this text with a chronological diagram of government regulation at the SSFL site. That diagram lists both "Federal Regulation" and "State Regulation" as in force since 1962, when California's "Agreement with AEC" occurred. *Id*. p. 37 (Amicus Appendix Tab 4).

Boeing virtually ignores the actual regulatory structure at the site. Its complaint terms the state's enactment of SB 990 "an unprecedented encroachment by the State of California. . ." Amended Complaint, ¶9 p. 4. However, Boeing's "Nuclear Operations" document, which lists Mr. Rutherford on it, reveals otherwise. As that document states, Boeing

> *has had a California license for its activities at the SSFL* since California became an Agreement State. In 1969, the Radiologic Health Section of the California Department of Health Services issued a broad radioactive materials license to [Boeing's predecessor] Rocketdyne covering activities at the SSFL.

Id. p. 39 (emphasis added). A copy of a Radiation Materials License issued by California for SSFL is attached as Amicus Tab 5 to this brief. It illustrates the state's longstanding, intensive regulation of the site.

B. California Has Regulated the Cleanup of Radioactive Contamination at SSFL for Decades, and Boeing Has Repeatedly Acknowledged That Regulatory Authority by Seeking State Approval of Individual Cleanups.

Not only did the state regulate the use of radioactive materials at the site, it has regulated cleanup actions involving those materials. In a 2007 Boeing document entitled "Radiological Release Process: Process for the Release of Land and Facilities for (Radiologically) Unrestricted Use," Boeing's declarant Mr. Rutherford detailed the cleanup process for radiological materials at SSFL. Amicus App. Tab 6.

The first page of this document recognizes California's involvement in the radiological release process, "since California is an Agreement State." *Id*. p. 2. Under the heading "Radiation Cleanup Standards," Mr. Rutherford stated that "Rockwell (Boeing's predecessor) submitted these cleanup criteria to DOE and [California] DHS *for approval* in June 1996. . . ." *Id*. (emphasis added). Mr. Rutherford explains that DHS "approved the limits in August 1996." *Id.* That month Mr. Rutherford wrote to the state acknowledging state approval of Rockwell's sitewide criteria. He requested that "the text of our Broad Scope 'A' Radioactive Materials License (0015-70) be amended" to incorporate the cleanup requirements. Def.App. Tab 23.

Thus, Boeing's predecessor recognized the need to obtain state approval for cleanup criteria. It also recognized the need to incorporate those criteria into the state-issued license that governed the activities of Boeing's predecessor at SSFL.

Mr. Rutherford's paper then summarizes the regulatory steps that must occur for Boeing to obtain a "release" for a building after cleanup is complete:

> Release for Unrestricted Use. The legal and regulatory process of "releasing a building for unrestricted use" means that,
>
> o Approved cleanup standards have been met.
>
> o DOE and DHS impose no further radiological controls or regulatory oversight for the building or land.
>
> o DHS removes the building from the Radioactive Material License....

Amicus Appendix Tab 6, p. 6. Mr. Rutherford's paper declares that part of this procedure for cleanup and subsequent release of building sites entails radiation surveys carried out by the California Department of Health Services. Mr. Rutherford then elaborates:

> Boeing then forwards a copy of the [Boeing consultant's] report to the DHS and requests either, that *DHS release the facility for unrestricted use* (Boeing-owned buildings), *or that DHS concur with the release for unrestricted use* (DOE-owned buildings).

Id. p. 5 (emphasis added). Thus, DHS must issue a release concurrence letter for DOE's buildings. But for the Boeing-owned buildings, DHS must release the building for unrestricted use and amend the state license to reflect that release:

> • Removal of Facility from Radioactive Materials License 0015-19. For Boeing-owned buildings, the DHS transmits a letter to Boeing releasing the building for

> unrestricted use and issues an amendment to Radioactive Materials License 0015-19, removing the facility from the license.

Id. p. 6.

In addition to Boeing, DOE has also confirmed the state's authority over the cleanup in DOE's Environmental Assessment prepared for the ETEC site in Area IV. The agency stated that the state has jurisdiction over Boeing's non-DOE radiological activities and cleanup, and that when DOE-owned buildings undergo decontamination, both California and DOE must concur in their release for unrestricted use:

> *As an Agreement State under the provisions of the Atomic Energy Act, the State of California also has jurisdiction over non-DOE radiological activities at ETEC.* The California Department of Health Services (DHS) *oversees the radioactive materials license held by Rocketdyne* [Boeing's predecessor]*, radioactive facility cleanup, and environmental monitoring.* DHS also conducts unannounced inspections to verify the amounts and types of radioactive materials being used onsite, evaluates radiation exposure to employees and the general public, and reviews records related to radiation usage at the site. *In particular, before a former DOE radiological facility at ETEC may be released for unrestricted (non-DOE) use in accordance with state regulatory standards, DHS must concur with the DOE determination regarding the decontamination and decommissioning of the facility*.

Def.App. Tab 5 (EA), p. 2-2 (emphasis added). Of 21 radiological facilities listed as decontaminated and decommissioned, DHS had released 14 of them. Amicus Appendix Tab 1 (EA Table I-3) p. I-17 to I-19.

In sum, Boeing now claims that the state lacks authority over cleanup of the SSFL and indeed never had such authority. For decades, however, the state has regulated both the use and cleanup of radioactive materials at the site. And Boeing has repeatedly requested approval from the state for cleanup actions and for amendments to its state radioactive materials license reflecting those actions. *See* Def.App. Tabs 17-23 (letters between Boeing and the State of California regarding approval of Boeing requests for approval of cleanup).[4] These facts cannot be reconciled with Mr. Rutherford's

[4] The delegation under the Atomic Energy Act to the State of California, the State's history of regulation under that delegation, and the small part of the site operated but not owned by DOE, all serve to distinguish the principal legal authorities cited by Boeing that involve nuclear cleanups. Thus, the decision in *United States v. Manning*, (footnote continued)

declaration that "DOE had exercised exclusive authority, without State interference…over the cleanup of radioactive contamination at SSFL." Rutherford Decl. ¶7.

C. The California Licenses Governing Use of Radioactive Materials at SSFL Regulated Large Amounts of Highly Toxic Radionuclides.

In a footnote to its brief, Boeing acknowledges the state's authority at the SSFL but immediately dismisses it as *de minimis*. Boeing represents that under the Agreement:

> an insignificant amount of the commercial activity at SSFL--involving the handling of calibration equipment, smoke detectors, and other industrial equipment containing small amounts of radioactive material--was subject to state license.

Boeing Memorandum, p. 12 n. 5.

This characterization of the state's authority is inaccurate. The radioactive materials regulated by the state emitted significant amounts of radiation:

(1) According to the U.S. Environmental Protection Agency ("EPA"), a smoke detector contains about a millionth of a curie of radioactivity. Def.App. Tab 13 p. 1. California Radioactive Material Licenses for the site, however, allowed possession and use of ten million curies (10^7) of mixed

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527 F.3d 828 (9th Cir. 2008), involved the cleanup of the Hanford Nuclear Reservation. But this site was owned by the Department of Energy itself, not by a private entity like Boeing. 527 F.3d at 831. The Court also found that state regulation of radioactive materials "invades the province of the AEA [Atomic Energy Act]." *Id*. at 838. At the SSFL, however, the bulk of the facility was Boeing-controlled, and the federal government has delegated authority under the AEA to regulate Boeing's activities to the State.

Likewise, the decision in *United States v. Commonwealth of Kentucky*, 252 F.3d 816 (6th Cir. 2001), concerned an uranium enrichment plant owned by DOE. *Id*. at 820. Once again, the Court found that the radioactive sources that the state attempted to regulate "are materials covered by the AEA, *i.e.* source, special nuclear, and byproduct materials." *Id*. at 823. These, however, are the same materials (except in quantities that might form a critical mass) that the Atomic Energy Commission delegated to the State of California. *See* 27 Fed. Reg. 3864 (delegating authority over "A. By product materials; B. Source materials; and C. Special nuclear materials in quantities not sufficient to form a critical mass"). Once again, the SSFL is not DOE-owned land, and Boeing controls and operates the bulk of it under state licenses. The decision in *Missouri v. Westinghouse Electric LLC*, 487 F. Supp. 2d 1076 (E.D. Mo. 2007), is distinguishable because Missouri never received a delegation of authority from the federal government. *Id*. at 1083 n. 4 ("It is undisputed that Missouri has not entered into such an agreement with the NRC.")

Finally, in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983), the Supreme Court found that states could not regulate the health and safety aspects of operating nuclear electric facilities. Under the AEA, that power can never be delegated to states. But there is no nuclear plant operating at SSFL; indeed, there is no longer any NRC license governing the area. Def.App. Tab 10, p. 3-1 to 3-2.

fission products--the radioactive products of nuclear fission. Amicus Appendix Tab 5, p. 2; Def.App. Tab 14, p. 2. This amount is *ten trillion times more radioactivity than found in a smoke detector,* or the equivalent of the radioactivity found in 10,000,000,000,000 smoke detectors.

(2) The state licenses governing radioactive materials did not just cover trivial matters such as calibration of instruments. For example, the state licensed a building on the SSFL property known as the "Hot Lab," and the license regulated the disassembly and examination of highly radioactive, irradiated nuclear fuel rods. Amicus Appendix Tab 5, p. 3; Def.App. Tab 14, p.3; Def.App. Tab 11, p. 27-28.

(3) Some of the state licenses authorized capsules containing very large amounts of Cesium-137, 70,000 curies each, for a total not to exceed one million curies. Def.App. Tab 14, p.2; Tab 16, p.1. According to a document submitted as part of a license application, a single capsule would emit 169,000 roentgen per hour at 30 centimeters. That same document lists 400-500 roentgen as the dose that will kill 50% of an exposed population within 30 days. Def.App. Tab 16, "WESF ^{137}Cs Gamma Ray Sources," p. 18. Each capsule thus was capable of producing *a lethal dose in about 10 seconds at 30 centimeters*.[5]

In short, the state radioactive materials license regulated large quantities of highly radioactive materials.

II. BOEING CANNOT CLAIM PREEMPTION ON BEHALF OF DOE WHERE DOE IS NOW ACTIVELY CONSIDERING THE CLEANUP STANDARDS FOR ITS BUILDINGS AT SSFL.

The only part of the SSFL operated by DOE itself was ETEC--the 90 acres leased for the Energy Technology Engineering Center located in Area IV. Although Boeing controls the vast majority of SSFL, Boeing's claim of preemption focuses instead on this small part of the site controlled by someone else and asserts injury if SB 990 applies to this area. However, DOE is now deciding the cleanup standards that it will use here, and the agency has announced that it will consider adopting the SB 990

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[5] The mathematical calculation is basic: 500r divided by 169,000r per hour equals a lethal dose in .003 hour. That latter figure--.003 hour--equals 10.8 seconds (.003 hour times 3600 seconds, the number of seconds in an hour).

standards. Thus, under the guise of preemption and in the name of DOE, Boeing seeks to curtail DOE's decisionmaking process.

The cleanup of the area of the SSFL used by DOE was the issue raised before Judge Conti in *NRDC v. DOE*, *supra*. Judge Conti ordered DOE to prepare an environmental impact statement. The Court also enjoined DOE from transferring or relinquishing control over any portion of Area IV until it "has completed an EIS and issued a Record of Decision pursuant to NEPA [the National Environmental Policy Act]." 2007 WL 1302498, at p. 22. Finally, the Court retained jurisdiction over the matter "until it is satisfied that DOE has met its legal obligations as they relate to the remediation of Area IV." *Id.*

DOE is actively complying with that decision. It completed its "Notice of Intent" to prepare the mandated EIS. 73 Fed. Reg. 28437 (May 16, 2008). At the same time, EPA is conducting a "comprehensive radioactive site characterization of Area IV." *Id.* at 28439. Most importantly, DOE has agreed to consider use of the SB 990 cleanup standards in its EIS. In its response to the public comments on the "scope" of the EIS, DOE stated that it would specifically consider a cleanup "that is specifically designed to meet the requirements of SB 990." Amicus Appendix Tab 7, U.S. Dept. of Energy, Scoping Response Comments for the Environmental Impact Statement for Remediation of Area IV of the Santa Susana Field Laboratory, p. 9.[6]

Thus, while Boeing alleges a current injury through DOE's compliance with SB 990, the public documents reveal that DOE is preparing an EIS to decide on cleanup levels within Area IV of the SSFL. Moreover, it is actively considering applying the criteria in SB 990. These circumstances dictate that Boeing's claim of preemption fails for two reasons: (1) it lacks standing to raise a claim on behalf of DOE, and (2) its claim is not ripe until DOE makes a cleanup decision.

In *Bova v. City of Medford*, 564 F.3d 1093, 1095-96 (9th Cir. 2009), the Ninth Circuit summarized the inter-related requirements of standing and ripeness:

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[6] Because the entire document is several hundred pages long, Amici's Appendix includes only the specific pages relied upon in this brief. The entire document can be found at: http://www.etec.energy.gov/EIS/Documents/SSFL_Area_IV_Final_Scoping_CRD.pdf

> Two components of the Article III case or controversy requirement are standing and ripeness. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009). These concepts are "closely related." *Id.* at 1123. To have standing, a plaintiff must have suffered an injury in fact that is "concrete and particularized;" that can be fairly traced to the defendant's action; and that can be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992). "While standing is primarily concerned with *who* is a proper party to litigate a particular matter, ripeness addresses *when* litigation may occur." *Lee v. Oregon*, 107 F.3d 1382, 1387(9th Cir. 1997). "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9thCir. 2000) (en banc). The ripeness inquiry in some cases may therefore "be characterized as standing on a timeline." *Id.*

For DOE facilities in Area IV, any "injury" that accrues would be to DOE, not Boeing. Boeing's claim thus fails under blackletter standing law: the principle of "third party standing." Under this principle, "litigants must assert their own legal rights and not those of others." *Service Employees Intern. Union, Local 5 v. City of Houston*, __ F.3d __, 2010 WL 323550 at *6 (5th Cir. 2010) (citation omitted); *accord RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 (10th Cir. 2009) ("A well-founded prudential standing limitation is that litigants cannot sue in federal court to enforce the rights of others."). *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975). Boeing can litigate only its own claims, not those of DOE.

Furthermore, the action must be ripe. A plaintiff's injury must cannot "'rest[] on contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Bova*, 564 F.3d at 1096 (citing *Texas v. United States*, 523 U.S. 296, 300 (1998), in turn quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985).) Here, DOE is deciding the standards for its cleanup within Area IV. Indeed, it is expressly considering whether to use the SB 990 standards. If DOE so decides, Boeing as its *contractor* plainly has no basis to complain of injury. And until that decision is made, Boeing cannot conceivably feel the effects of the agency decision "in a concrete way," as the doctrine of ripeness requires.

III. FEDERAL NUCLEAR LAW DOES NOT PREEMPT STATE CLEANUP OF CHEMICALS PURSUANT TO AUTHORITY DELEGATED UNDER THE FEDERAL RESOURCE CONSERVATION AND RECOVERY ACT.

Boeing argues that federal nuclear law preempts all cleanup at the SSFL. *See* Amended Complaint, p. 18 (Prayer that the Court "declare. . . that SB 990 is invalid and unconstitutional in its

entirety. . .") In doing so, Boeing ignores the full range of contamination at the site.

In addition to radioactive contamination, the SSFL site contains considerable amounts of purely chemical wastes generated by such activities as rocket-testing. These wastes, however, are not subject to regulation under the federal Atomic Energy Act. Rather, the federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.,* governs cleanup of chemical contaminants. As the Court stated in *United States v Manning*, 527 F.3d at 836, "Unquestionably, the State has the authority to regulate nonradioactive hazardous materials, and does so primarily through the RCRA and the HWMA [state law]." *See also Legal Environmental Assistance Foundation v. Hodel*, 586 F. Supp. 1163, 1167 (E.D. Tenn. 1984) (RCRA governs Atomic Energy Act facilities for nonradioactive wastes).

DOE has recognized that chemical contamination is remediated pursuant to RCRA. In *NRDC v. DOE*, Judge Conti's decision summarized:

> The Draft EA covered the dismantling and demolition of approximately sixty-four structures remaining in the ETEC: thirteen buildings making up three radiological facilities, a sodium facility, and fifty other facilities. *See id.* at 2-4. The Draft EA listed some of the these facilities as radiologically contaminated. *See id.* It also identified areas of radiologically contaminated soil in Area IV, based on information derived from the Rocketdyne Survey. *See id.* at 3-2. The Draft EA categorically excluded consideration of possible chemical contamination, which, it states, "will be considered in the Resource Conservation and Recovery Act (RCRA) Facility Investigation process." *See id.* at 1-2.

2007 WL 1302498, at *6.

Under RCRA, EPA may delegate its implementation authority to states. 42 U.S.C.§ 6926(b). California has received such a delegation about twenty years ago. *See* 66 Fed. Reg. 49118 (Sept. 26, 2001) (granting the State of California final authorization under RCRA). As such, the state regulates the cleanup at SSFL under RCRA. Accordingly, Boeing's claim of complete preemption of SB 990 fails.

IV. RATHER THAN CONSTITUTING A "DRASTIC DEPARTURE" FROM CURRENT PRACTICES, SB 990 UTILIZES WELL- ESTABLISHED CLEANUP STANDARDS.

Finally, Boeing argues that SB 990 employs standards that apply "an unprecedented cleanup process" that represents "a drastic departure from generally applicable state and federal environmental laws." Boeing Memorandum, 15, 16. However, SB 990 merely incorporates well-established, presently existing standards--just not the standards that Boeing prefers.

SB 990 enacts Health and Safety Code Section 25359.20(c), which in turn references Health and Safety Code 25356.1.5. Under this latter section, a response action must be based on: (1) "Subpart E of the National Oil and Hazardous Substances Pollution Plan," regulations adopted by EPA pursuant to CERCLA (*see* 40 C.F.R. §300.400 *et seq*); and (2) "the policies, guidelines, and practices of the Environmental Protection Agency" developed pursuant to federal law for health risk assessments. Cal. Health & Safe. Code §25356.1(a)(1), (b). In other words, the "unprecedented process" is nothing more than widely used EPA standards.

Given this source of the SB 990 standards, it is hardly surprising that Boeing's alleged "drastic departure" from law disappears upon closer examination:

(1) SB 990 establishes a "risk range" of 10^{-6} to 10^{-4}, i.e., a permissible cancer risk of a one in a million to one in ten thousand. This standard sets a hundred-fold range of flexibility for determining the final cleanup standard. This range is the standard risk range for carcinogens, and 10^{-6} is the risk range point of departure. Both standards are found in EPA's Oil and Hazardous Substances Pollution Plan. *See* 40 CFR 300.430(i) (A)(2).

(2) SB 990 does not require Boeing to clean up below levels that can be detected—again, the standard practice, as required by 40 CFR §300.430(i)(A)(3).

(3) Mr. Rutherford's Declaration asserts that SB 990 requires cleanup below background levels. Rutherford Declaration, ¶40. But, as indicated above, SB 990 employs the EPA's standard CERCLA practices, including EPA's policy on background levels for cleanups:

> Generally, under CERCLA, cleanup levels are not set at concentrations below natural background levels. Similarly, for anthropogenic contaminant concentrations, the CERCLA program normally does not set cleanup levels below anthropogenic background concentrations.

Amicus Appendix Tab 8, "Role of Background in the CERCLA Cleanup Program," U.S. EPA Office of Solid Waste and Emergency Response and Office of Emergency and Remedial Response, April 26, 2002, OSWER 9285.6-07P, p. 7.

(4) SB 990 sets the prospective land use for the area as "rural residential/agricultural." In determining prospective land use for cleanup purposes, standard practice under CERCLA is to rely heavily on the current zoning as well as on the views of local officials. Plaintiff's Appendix, Tab 26,

OSWER Directive No. 9355.7-04 "Land Use in the CERCLA Remedy Selection Process," May 25, 1995, p. 2, 4-5. The land use called for in SB 990 does just that. The land use chosen corresponds to the current zoning for most of the property. Defendant's Dec. of Brausch ¶5. Furthermore, both Ventura and Los Angeles Counties, the two governments most affected by land use at the SSFL site, supported SB 990, including its determination of prospective land use. Pl.App. Tab 2, p. 4.

(5) SB 990 requires the "summing" or adding together of radioactive and chemical risks in determining risk levels. Once again, this usage is standard practice under CERCLA:

> Q 28. Should radionuclide and chemical risks be combined?
> A. Yes. Excess cancer risk from both radionuclides and chemical carcinogens should be summed to provide an estimate of the combined risk presented by all carcinogenic contaminants as specified in OSWER directive 9200.4-18 (U.S. EPA 1997a).

Amicus Appendix Tab 9, "Radiation Risk Assessment At CERCLA Sites: Q & A", OSWER Directive 9200.4-31(P), U.S. EPA, Dec. 1999, p. 11.[7]

(6) SB 990 requires the use of EPA's Published Preliminary Remediation Goals for radioactivity, which are EPA's standardized values. The Legislature thus chose in enacting SB 990 to use EPA's default remediation goals. Pl.App. Tabs 28,29.

Finally, even if SB 990 *did* set stricter standards for the highly polluted SSFL area, which it does not, Boeing's argument would fare no better. As the State Defendant has demonstrated, states like California that have agreements under the Atomic Energy Act may employ cleanup standards more protective than those of the Nuclear Regulatory Commission. Defendant's Opposition to The Boeing Company's Motion for Summary Judgment, p. 22-24. And EPA has urged states to take this step.

In 2000, EPA wrote to the Conference of Radiation Control Protection Directors, the organization of directors of state radiation programs. EPA's letter reminded the directors that Agreement States may adopt more protective cleanup standards than those of the NRC. EPA's letter then "strongly encourage[d]" the states to take this step by adopting cleanup standards based upon

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[7] The full document can be accessed at: http://www.epa.gov/superfund/health/contaminants/radiation/pdfs/riskqa.pdf.

EPA's CERCLA guidance rather than upon the NRC's standards. Amicus Appendix Tab 10 (Letter from U.S. EPA to Executive Director), p.2.

In SB 990, California accepted EPA's invitation and did precisely what EPA suggested for the cleanup of the SSFL. SB 990 follows and incorporates EPA's CERCLA practice.

Finally, this action by California conformed to DOE Guidance as well. DOE and EPA have jointly adopted a "Policy on Decommissioning Department of Energy Facilities Under CERCLA." Pl. App. Tab 23. The DOE/EPA joint policy establishes that EPA's DOE nuclear sites should be cleaned up consistent with CERCLA's standards..

In short, Boeing's "drastic departure" from accepted cleanup standards does not exist.

CONCLUSION

For the above reasons, the Court should deny Boeing's Motion for Summary Judgment.

DATED: March 1, 2010

Respectfully submitted,

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